IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 860 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VAJSI DEVANAND AHER
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 860 of 1994
MR PM THAKKAR for Petitioners
MR IM PANDYA, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 28/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. This appeal has been filed by the original accused nos. 1 to 5 and 8 and 9 of Sessions Case No. 166 of 1993 of Sessions Court, Jamnagar challenging the judgment and order of conviction and sentence passed by the Ld. Addl. Sessions Judge dated 4th July, 1994. The appellants have been convicted for offences under sections 143, 147, 148 and 302 read with section 149 of the Indian Penal Code (for short 'IPC'). For committing offence u/S. 143 of the IPC they have been sentenced to suffer SI for one month and to pay fine of Rs.100/-, for committing offence u/S. 147 they have been sentenced to suffer SI for two months and to pay fine of Rs.200/-, for committing offence u/S. 148 of the IPC they have been sentenced to suffer SI for three months and to pay fine of Rs.300/- and for committing offence u/S. 302 read with section 149 of the IPC they have been sentenced to suffer imprisonment for life and to pay fine of Rs.400/-, in default SI for one month. Original accused nos. 6 and 7 have been acquitted by the learned trial Judge.

2. The facts relevant for deciding this appeal can be stated as follows :-

2.1. The incident in question took place on 21st June, 1993 at about 7.15 p.m. in the outskirts of village Kalyanpur. According to the prosecution, on that day deceased Parbat had been to the hotel of his brother Rayde, which is situated near the sign board of village Modpar in the afternoon and he stayed at the hotel till the evening. In the evening at about 7.00 p.m. he and his brother Rayde closed the hotel and started returning home on a motor cycle. When they reached near the field of one Pala Lakha, Devanand i.e. appellant no. 1 rolled down a cart from the field of Pala Lakha on the road on which the deceased and his brother Rayde were going. As a result of sudden obstruction caused by the cart, the motor cycle dashed against the cart and had fell down on the ground. The deceased and his brother Rayde also fell down on the ground. At that time appellant nos. 1, 2, 5 and 7 came there with sticks and appellants nos. 3, 4 and 6 with iron pipes. They came there shouting to kill the deceased and his brother. It is the case of the prosecution that appellant no. 6 gave a blow with iron pipe on the back side of the head of the deceased and as a result of that, he started bleeding and he ultimately fell down on the ground. Immediately thereater appellant no. 7 gave a stick blow on the left leg of the deceased

and appellant no. 2 gave a stick blow on the back of the deceased. He was also assaulted by appellant no. 5, who gave a stick blow on the left leg; whereas appellant no. 4 gave a blow with iron pipe again on the left leg of the deceased. Appellant no. 3 gave a blow with iron pipe on the right leg of the deceased and again appellant no. 6 gave a blow with iron pipe on the left hand of the deceased. Original accused nos. 6 and 7 during this assault had caught hold of Rayde. When the deceased and his brother were assaulted they started raising shouts for help and on hearing their shouts prosecution witnesses Vira Lakhman and Naran Vira came there. On their arrival the assailants left the deceased and his brother and escaped from the scene. Appellant no. 7 went away on motor bike, whereas some appellants ran away and some went away in the cart of original accused Devanand Raja.

2.2. The brother of the deceased Rayde requested Naran Vira to go to his residence and inform his brother Abhabhai Ramabhai at village Kalyanpur about the incident. Kalyanpur is hardly at a distance of one and half K.M. from the place of the incident. Accordingly Naran Vira went to the house of Abhabhai and told him about the incident. Abhabhai, therefore, immediately in company of his brother Hamir Meraman went to the place of incident in the six seater rickshaw of Meraman. Naran Vira also went with them. When they reached the scene of offence, they saw Parbat i.e. the deceased lying in unconscious condition. His other brother Rayde and Vira Lakhman were standing. Immediately the injured was made to lie in a rickshaw and all the four brothers went to Bhanvad Government dispensary for treatment of the injured. On way to Bhanvad, Abhabhai asked Rayde as to what had happened and Rayde narrated the incident to him in detail. It is the case of the prosecution that after receiving initial treatment, they were advised to take deceased at Irvin Hospital at Jamnagar and, therefore, ambulance was called and brother of the deceased Abhabhai took him to the Irvin Hospital. Rayde and others i.e. Vira Lakhman and Naran Vira came back to village Kalyanpur. At the Irvin hospital the Medical Officer on duty after examining Parbat declared him dead. Thereafter, the inquest Panchnama was drawn and the FIR was lodged at about 2.15 hours on 22nd June, 1993. The FIR was recorded by P.S.I. Rameshchandra Bhikhamdas Nimavat then serving with Jamnagar City "B" Division Police Station, which was forwarded to Bhanvad Police Station since the offence was committed within its jurisdiction.

2.3. On receiving the information the usual investigation commenced and in the course of the same, present appellants and other original accused were arrested. The investigating agency also recorded statements of various persons who were connected with this incident and drew various panchnamas including that of scene of offence, dead body was sent for post mortem examination and after receiving the post mortem notes they were placed in the record of the investigation. On conclusion of the investigation, charge-sheet was filed in the court of the Ld. Judicial Magistrate First Class at Bhanvad Court and the Ld. Magistrate after complying with the formalities committed the case to the Court of Sessions as the offence u/Ss. 302 and 149, etc. of the IPC are exclusive triable by the Court of Sessions.

3. At the trial, the Ld. Addl. Sessions Judge, Jamnagar framed the charge against the present appellants and original accused nos. 6 and 7 at Exh. 4, in which they were charged for having committing offences which have been already described above. All the appellants and the original accused denied the guilt and claimed to be tried.

4. At the trial, prosecution relied on oral as well as documentary evidence. In support of its case, the prosecution examined P.W. 1 Dr. Satish Dinkar Kalele at Exh. 18, P.W. 2 Abha Rama at Exh. 24, P.W. 3 - Rayde rama at Exh. 25, P.W. 4 - Naran Vira at Exh. 27, P.W. 5 - Vira Lakhman at Exh. 28, P.W. 6 - Nathu Karsan at Exh. 29, P.W. 7 - Prakash Bhagvanji at Exh. 31, P.W. 8 - Rama Karsan at Exh. 31, P.W. 9 - Lakhman Mera at Exh. 32, P.W. 10 - Naran Jesabhai at Exh. 34, P.W. 11 Arjan Nathu at Exh. 35, P.W. 12 - Samant Sajan at Exh. 36, P.W. 13 - Pala Vira at Exh. 37, P.W. 14 - Devshi Khima at Exh. 38, P.W. 15 - Arjan Khima at Exh. 39, P.W. 16 - Natha Devanand at Exh. 40, P.W. 17 Mahendra Jalamsinh Parmar at Exh. 42, P.W. 18 - Ranjitsinh Nagbha Rana at Exh. 72 and P.W. 19 - Rameshchandra Bhimadas Nimavat at Exh. 77. The prosecution also relied on documentary evidence such as complaint at Exh. 87, the post mortem report at Exh. 90, the panchnama of the scene of offence Exh. 43, the arrest panchnama at Exh. 46, etc. At the end of recording of the evidence by the prosecution, the appellants and other original accused were put all the circumstances appearing against them in the evidence in the statement u/S. 313 of the Criminal Procedure Code. However, except for denying the case of prosecution, they do not seem to have raised any specific defence. In short their defence appears to be that of a general

denial.

5. At the end of the trial, the learned Judge, as stated above, came to the conclusion that the guilt of the appellants was established beyond any reasonable doubt and he convicted them for various offences and sentenced them to suffer various terms of the imprisonment. Original accused nos. 6 and 7 were acquitted as benefit of doubt was given to them. In these circumstances, the present appeal is filed.

6. Mr. P.M. Thakkar, Ld. senior counsel appearing for the appellants has submitted that the judgment and order of conviction and sentence passed by the learned trial Judge are contrary to the evidence on record and no conviction can be based in this case, as the prosecution has hopelessly failed to establish the guilt of the present appellants. He has further submitted that the evidence adduced by the prosecution in support of its case is totally unreliable and on the strength of such evidence the appellants cannot be convicted for serious offence u/S. 302 read with section 149 of the IPC. According to him, the prosecution has cooked up a false case against the appellants because the complainant and his brothers were entertaining a serious grudge against the appellants. In support of this contention, he has also submitted that considering the fact that despite several opportunities the complaint was not lodged at the first available opportunity, but it was lodged at a very belated stage which go to show that it was lodged after due deliberations and having full knowledge of the injuries suffered by the deceased as, by then the inquest panchnama was already drawn. In other words, according to Mr. Thakkar, the present appellants alongwith the original accused have been falsely roped in and they have been falsely assigned the weapons and the roles in light of the contents of the inquest panchnama which clearly reveals the injuries suffered by the deceased. He has further submitted that though according to the prosecution apart from Rayde, Via and Naran were also eye witnesses of the incident. However, from the evidence it clearly transpires that Naran and Vira had never seen this incident and they had been posed as eye witnesses only with a view to support the prosecution case and and to lend more credibility to the evidence of brother of deceased, namely Rayde. He has also submitted that the trial Court has not believed the evidence of Naran and Vira and hence Rayde is the sole eye witness, on whose evidence extensive reliance has been placed by the trial Court. According to Mr. Thakkar, his evidence also does not inspire any confidence. Considering the

other circumstances on record, no conviction can be based on the evidence of such solitary eye witness. It is his submission that the theory of old enmity cannot be accepted because so far the panchayat election is concerned, it was the complainant who had lost the election and not appellant no. 6 and, therefore, any grudge that would be there, it would be on the part of the complainant and not the appellants. He has further submitted that so far the fair price shop is concerned, the brother of appellant Laxman did not get the permit. As against that, the same was given to the deceased Parbat. However, that was much prior to the present incident and the person concerned, namely Laxman had expired about six years back and, therefore, there was no reason for the appellants to pick up any quarrel against the deceased and his brother on that count. Lastly, he has submitted that considering the fact that the medical evidence on record clearly shows that not a single injury out of 16 injuries suffered by the deceased was a fatal injury and except for injuries nos. 1, 2, 15 and 16 the other injuries were of simple nature and therefore, it cannot be said, even if it is believed that the appellants were the real assailants, they had any intention to commit murder of the deceased. In that event it would be a case for committing offence u/S. 324 or section 325 of the IPC and nothing more that that. Lastly he has submitted that the present appeal be allowed and the judgment and order of conviction and sentence be set aside.

6.1. As against that, Mr. I.M. Pandya, Ld. APP has submitted that the prosecution, by leading cogent and reliable evidence, has amply proved that the appellants had committed the offences with which they have been charged and the finding given by the trial Court on this count is absolutely just and proper and this Court should not disturb it. He has further submitted that though Rayde is the sole eye witness, his evidence is trust worthy and it inspires confidence and, therefore, there is no reason for not believing and relying on the evidence of this witness. He has further submitted that the evidence of Rayde has been fully corroborated by the medical evidence on record and especially the post mortem notes. Lastly he has submitted that when the evidence is found to be totally reliable and the conviction absolutely legal, this Court may not interfere and disturb the judgment of the trial Court and appeal may be dismissed.

7. With a view to reappreciate the entire evidence on record and the contentions raised on behalf

of the appellants as well as the respondent - State, we have carefully gone through the entire record of this case. The medical evidence in this case comprises the deposition of Dr. Satish Dinkar Kalele P.W. 1 Exh. 18. He has carried out the post mortem of the deceased on 22nd June, 1993 at about 9.40 a.m. On examination he has found 16 external injuries suffered by the deceased and the same have been adequately described in his evidence as well as in the notes of post mortem examination, which have been brought on record at Exh. 19. According to the witness, injury nos. 1, 2, 15 and 16 were of serious nature. The others were simple injuries. In the opinion of this witness, the death was caused due to shock and haemorrhage on account of multiple injuries to the body. The evidence of this witness, therefore, clearly establishes that the deceased had died on account of the injuries suffered by him in the incident, which took place on 21st June, 1993. We are, therefore, in agrement with the finding given by the trial Court that the deceased had died homicidal death.

8. To appreciate whether the appellants were guilty of committing this offence, we would first turn our attention to the evidence of complainant - Abhabhai Ramabhai, who has lodged complaint with the police at Irvin Hospital at Jamnagar. This witness is not an eye witness and whatever he has stated in the complaint/FIR is totally based on the information that was given to him by his brother Rayde, who is an eye witness to the incident. This witness has, however, narrated the incident in detail before the police officer, who recorded his complaint in which it has been stated in what manner the incident took place and for what reason. In the complaint he has implicated all the present appellants and has described their respective roles. Since we have already stated the respective roles in the foregoing paragraphs, it is not desirable to repeat the same here. Suffice it to say that the complainant has stuck to the said version in his examination-in-chief. In the cross-examination the defence has tried to bring on record that he has deliberately not given complaint at Bhanvad Police Station though the police station is situated at a very short distance from the Government dispensary where deceased was initially taken by the complainant and his brothers. When he was asked why he did not go to Bhanvad Police Station for lodging complaint, this witness has replied that in his opinion the police of Bhanvad Police Station were likely to favour the appellants and, therefore, he thought it fit not to approach them but to file complaint at Jamnagar. The defence has also made an attempt to bring out on

record that he had criminal antecedents and with that reason it was put to him that he was arrested by the police in the year 1990 in connection with the prohibition case and that he i.e. the witness entertained a suspicion that it was appellant no. 7 who had played the role in getting him arrested. He was also asked by the defence that against his brother, chapter cases were filed and again the same were filed by appellant no. 7 and, therefore, the witness was falsely implicating the appellant no. 7 and other appellants in this case. These suggestions have been denied by the witness. Though this witness has been extensively cross-examined by the defence, nothing much of any importance from the point of view of the appellants has been brought out in his evidence.

9. The next witness is Rayde Ramabhai P.W. 3 Exh. 25, who is the eye witness to this incident. It is his say that on the day of incident his brother Parbat had been to his hotel with a tiffin carrying food for him and he had stayed there till the evening at about 7.00 p.m. Around 7.30 p.m. they closed the hotel and were returning to Kalyanpur on the motor cycle. When they reached near the field of Babu Lakha, appellant no. 1 pushed a cart from the field of Babu Lakha on the road on which this witness and his brother were proceeding on motor cycle. The cart all of a sudden obstructed their way. As a result of this, the witness, who was driving the motor cycle immediately applied brake but the motor cycle dashed with that cart and they fell down and in the meanwhile the appellants and other accused came there shouting to kill the witness and his brother. The witness has also stated that appellant no. 6 gave a blow with iron pipe on the back side of head of deceased and appellant no. 9 gave a blow with stick on the left leg of the deceased. Appellant no. 2 gave a blow on the back of the deceased with stick, whereas appellant no. 5 gave a blow with stick on the leg of the deceased. Appellant no. 3 also gave a blow with pipe on the leg of the deceased, whereas appellant no. 4 gave a blow with pipe, also on the left leg of the deceased. According to this witness, at the time of assault he was caught hold by original accused nos. 6 and 7. At this time they raised shouts and on hearing their shouts Vira Lakhman and his son Naran Vira arrived there. He has further stated that on seeing them the appellants ran away from the place of offence. He has also stated that since he was not in a position to drive motor cycle, he asked Naran to go to his place and inform his brother about the incident. When is brothers came there, he went alongwith them in the six seater rickshaw. First they went to

Bhanvad Government dispensary for taking treatment for injured Parbat and thereafter he returned to Kalyanpur and his elder brother Abhabhai had gone to Jamnagar taking injured to Irvin Hospital for further treatment. In the cross-examination of this witness the defence has tried to challenge this version and has tried to establish that he was never at the scene of offence and that he was not an eye witness. He has been extensively cross-examined by different counsels for the defence. He has, by and large, withstood the cross-examination. In answer to the question as to why he did not go to Bhanvad Police Station for lodging complaint, he has replied that he was not in the proper state of mind at that time and that was the reason he did not go to Bhanvad Police Station for lodging complaint nor he did accompany his elder brother to Jamnagar, since according to him, he is illiterate, whereas his brother was in a better position to inform the police about the incident. This witness has been confronted with certain contradictions and omissions vis-a-vis his police statement and especially with regard to the fact that he had never stated before the police that accused nos. 6 and 7 had caught hold of him at the time when the assault was going on on the deceased. Though he has insisted that this fact has been stated, the evidence of investigating officer shows that he had not stated so before the police. An attempt has also been made to bring out his criminal antecedents and several questions have been put to him on that count. This witness has stated that the cases against him have been falsely filed. However, so far the main story of prosecution is concerned, the defence has not been able to dislodge this witness and his evidence by and large seems to be reliable.

10. The other two witnesses, namely Naran Vira and Vira Lakhman P.Ws. 4 and 5 are concerned, from their evidence it clearly appears that they have arrived at the scene of offence after the assault is over. Inspite of that, they have made an attempt to show that they had witnesses the entire incident and had seen the appellants delivering blows on the deceased. The trial Court had not found their evidence trustworthy. On going through the evidence of these witnesses, we are also of the opinion their evidence does not deserve much confidence and the finding given by the trial Court is proper.

11. The other evidence comprises witnesses who have acted as panchas while drawing various panchnamas. They have turned hostile and their evidence need not be dealt with in this judgment.

12. This brings us to the evidence of police witnesses. P.W. 17 - Mahendra Jalamsinh Parmar, who at the relevant time, was discharging duty at Bhanvad Police Station as Police Sub Inspector. He has stated that on 22nd June, 1993 he had received a written complaint from the Jamnagar City Police Station through Police Constable Lalubha Gelubha, which was recorded by the Police Sub Inspector Mr. R.B. Nimavat at about 10.00 p.m. previous night. On receipt of the complaint, he registered the offence at C.R. No. 47 of 1993 for offences under sections 147, 148, 302 of the IPC and took over the investigation. In the course of investigation, he recorded statements of the witnesses, namely Rayde Rama, Vira Lakhman, etc. He also arrested the appellants and other original accused and seized the weapons produced by the appellants and other original accused. He drew the panchnama of the scene of offence, collected blood stained earth, broken glasses of mirror of motor bike, etc. By drawing a separate panchnama he seized the motor bike on which the deceased and P.W. Rayde have ridden. He also sent the blood stained clothes of the deceased to the Forensic Science Laboratory and obtained serological report from the same. In the cross-examination he has stated that before he received the complaint he had not received any telephone from Medical Officer of Bhanvad Government dispensary. He also states that the distance between the Government hospital and Bhanvad Police Station is of 5 to 7 minutes on foot. He also states that on way to Bhanvad Government hospital from Kalyanpur the police station is situated and one would have to pass from nearby the said police station for going to the said hospital. He has also stated that the police station remains open for 24 hours and never a lock is applied to it. He has denied the suggestion made by the counsel for the defence that the appellants had never voluntarily produced the weapons and they had never presented themselves before the police. He has also denied the suggestion that the cart of Babu Lakha was not seized. He has been shown the statements of Rayde and other witnesses with a view to bring on record certain contradictions, which now have been duly proved. It appears from his evidence that Rayde had not stated before the police that accused no. 6 Tapu Raja and accused no. 7 - Devanand Raja had caught hold of him. He has also stated that Rayde had stated before him in his police statement that his brother Parbat used to ply rickshaw and he used to carry the tiffin for him (Rayde). Similarly the contradictions from the evidence of Vira Lakhman and Naran Vira had also been put to him with regard to the role played by accused

nos. 6 and 7 and from the evidence of this witness, it appears that Naran Vira and Vira Lakhman have made improvements in their evidence by ascribing specific role to the original accused nos. 6 and 7. It also appears from his evidence that during the course of investigation he came to know that the deceased was first taken to the Medical Officer at Bhanvad Government Hospital and that he had received treatment there. He has also denied the suggestion that the statement of Medical Officer of Bhanvad Government hospital had been recorded and the medical case papers regarding the treatment given to the deceased were seized from him but they were deliberately not produced. He has admitted in his evidence that except the blood stained clothes of the deceased, he had not seized any clothes of the witnesses.

13. The next evidence is of P.W. 18 Ranjitsinh Nagbha Rana. He has stated that while he was discharging duty on 21st June, 1993 at Jamnagar City "B" Division Police Station as P.S.O. he had received one Yadi from Irvin Hospital at 0.25 hours from lady Head Constable Muktaben and accordingly after noting down the same in his police station diary, he sent P.S.I. Mr. Nimavat to record complaint at Irvin Hospital. P.S.I. Nimavat after recording complaint sent it to the police station alongwith Yadi. Upon receiving the said complaint he had registered offence at C.R. No. 47 of 1993 of the said police station. In the cross-examination, after examining Exh. 74 he has stated that the first information of the offence was given at 3.35 hours on 22nd June, 1993. He had received the report at 3.35 hours. According to him, the distance between the police station and Irvin Hospital is short and one would take about three minutes time to reach hospital. He has denied the suggestion made on behalf of the defence that a false complaint has been made out against the appellants and other original accused.

14. Lastly the evidence of Rameshchandra Bhikhamdas Nimavat P.W. 19 is at Exh. 77. He is the officer who recorded the complaint of Abhabhai at the Irvin Hospital and also drew the inquest panchnama. According to him, he had gone to the said hospital as per the direction given by the P.S.O. Ranjitsinh of City "B" Division Police Station of Jamnagar on 22nd June, 1993. He started for the hospital at about 12.27 hours and after reaching the hospital he first drew the inquest panchnama. Thereafter he recorded complaint of Abhabhai. According to him, he commenced the recording of the complaint at 2.15 hours and completed at 3.25 hours on 22nd June, 1993. He has stated in the cross-examination

that when he went to the hospital Abhabhai was not available and due to humanitarian ground he first drew the panchnama of the inquest. In the cross-examination he has also stated that in the complaint Abha Rama had not stated that Tapu Raja and Devanand Raja had caught Rayde. He has denied the suggestion made by the defence that he, Abhabhai and other relatives of Abhabhai had together concocted a false complaint against the appellants and other original accused.

15. We have carefully scrutinised this evidence especially in light of the rival submissions. From the record it clearly appears that on the day of incident some time in the noon Parbat had gone to the hotel of his brother P.W. Rayde, since on that day his fair price shop was closed. He had taken lunch for Rayde in a tiffin. He stayed there for almost whole day and in the evening at about 7.00 p.m. they closed the hotel and started returning home. An argument has been advanced on behalf of the appellants that the witness Rayde is not telling the truth when he says that the hotel was closed at 7.00 p.m. because his hotel is situated on the highway and normally at that hour no hotel owner would close his business because the usual time for having meals commences from that hour onwards. It may, however, be noted that the witness Rayde has categorically stated in his evidence that he did not have any electric connection in his hotel. It is, therefore, quite understandable that he might be finding it very difficult to run the hotel without any electric light and therefore, it was very natural for him to close the hotel and go home. We do not find any falsehood in the evidence of Rayde when he says that normally shuts down the business at about 7.00 p.m. It also appears that both these brothers were proceeding to Kalyanpur i.e. the village in which their residences are situated and on way they were accosted by the appellants, who it seems, had preplanned their attack on the deceased and his brother. It may also be noted here that appellant no. 1 had rolled down the cart from the edge of Babu Lakha's field in such a manner that while the deceased and his brother Rayde had almost reached at that place, the cart all of a sudden obstructed their way and as a result of that, it dashed against the cart and both the riders fell down. It is, therefore, very easy to believe that when such a plan is hatched out against the deceased and his brother, it can be for sure said that the appellants had gathered in the field of Babu Lakha with deadly weapons like iron pipes and sticks with a view to carry out assault and to prevent their escape the cart was forcibly pushed on to the road completely obstructing the way of

the deceased and his brother. An argument was advanced by the defence i.e. the appellants that the present appellants and original accused nos. 6 and 7 were wrongly named by the solitary eye witness and that was done only because they were not able to know as to who had caused injuries to the deceased. It also appears that when all of a sudden pre-planned attack was carried out on the deceased and his brother Rayde, it makes it very clear that the appellants and original accused who were 9 in number, had intended to form unlawful assembly with a common object to carry out the assault on the deceased and his brother.

15.1. So far the evidence of prosecution witnesses Rayde, Naran Vira and Vira Lakhman is concerned, it has been submitted that their evidence was not at all reliable. It is true that considering the evidence of Naran Vira and Vira Lakhman it clearly appears that they had reached the spot of incident after it was over and it is also doubtful whether they could have reached there after hearing the shouts in time i.e. at the time when the actual assault was made. They have also made improvements on vital aspects so as to pose them to be eye witnesses. Their evidence, therefore, does not inspire confidence and we are not inclined to accept their evidence.

15.2. However, so far the evidence of Rayde is concerned, it sounds very natural and secondly that he being the real brother of the deceased, he would not allow the real accused or culprit to go scot-free. The very fact that the deceased had suffered 16 injuries on his person and these injuries have been amply described by P.W. Rayde and which have been duly corroborated by the post mortem report, we find that despite the fact that Rayde is the solitary eye witness, his evidence receives complete corroboration from the medical evidence. If that be so, then we do not have any reason to disbelieve P.W. Rayde and in that event the case of the prosecution stands fully established.

15.3. An attempt has been made by the counsel for the appellants to show that the first information was deliberately not given at the first available opportunity and the delay caused in lodging the FIR has been made with a view to concoct a story which would involve all the present appellants as well as accused nos. 6 and 7. In support of this contention Mr. Thakkar has argued that Naran Vira the complainant and Rayde first went to the Government hospital at Bhanvad and at that place some treatment was given by the Medical officer of Bhanvad

hospital to the deceased. However, though the police station is hardly at a very short distance, no attempt was made by any of them to lodge complaint at the said police station. He has further submitted that the prosecution witnesses, namely Naran Vira, Rayde and Abhabhai have given different reasons for not approaching the said police station which are found not convincing at all. It is true that Abhabhai and Rayde could have approached the police station at Bhanvad immediately. The reason given by Rayde that he was disturbed and he was not at that time in his proper state of mind and therefore, he did not go there. So far Naran Vira is concerned, he has stated that there was lock at the police station and therefore, no police could be contacted. And so far Abhabhai is concerned, he has stated that he did not have any confidence in the police at Bhanvad and he thought it fit to lodge complaint before the police at Jamnagar. We may not attach much importance to the evidence of Naran Vira. However, so far the evidence of Rayde is concerned, it is quite possible that he having seen only short while ago, a deadly assault on his brother, he would not be in a proper state of mind to lodge complaint. So far the evidence of complainant is concerned, may be that he was entertaining some doubt regarding the attitude of the police. It cannot be said that the FIR was not given at Bhanvad Police Station only with a view to concoct it with the help of police. It may also be noted here that first and foremost anxiety on the part of Abha Rama, being elder brother of the injured, to shift the injured at the place where better treatment would be available, he would have first thought to take the deceased at Jamnagar Irvin Hospital to get necessary treatment for his dying brother. Unfortunately, his efforts in taking his brother to Irvin Hospital were failed as the deceased was declared dead by the Medical Officer at Irvin Hospital. It was at this juncture that Abhabhai might have thought it fit to lodge complaint against the present appellants. If the same is not gross delay, which would prompt us to hold against the prosecution but it appears that the delay has happened mainly due to obtaining proper treatment for deceased. In that view of the matter, the so called delay in lodging the FIR can be condoned.

16. Mr. Thakkar on the question of delay caused has placed reliance on several decisions the first being of the Apex Court in a judgment rendered in the case of Apren Joseph @ Current Kunjukunju v/s. State of Kerala reported in AIR 1973 S.C. p. 1. Having gone through the facts of this case, it clearly appears that

this decision will not render much help to the appellants because considering the facts of that case the Apex Court has clearly felt that the concerned witness was telling imaginary story with regard to the incident, which could not be accepted. Here in this case that is not so. The account of the eye witness regarding incident is very accurate. Not only that but even from the surrounding circumstances, it receives adequate corroboration and therefore, it cannot be said that the prosecution witness Rayde is telling some imaginary story. In this very decision it is said by the Apex Court that if otherwise the prosecution story is found to be acceptable, the delay in lodging the FIR was not much cause difficulty in the way of the prosecution. The second decision relied on by Mr. Thakkar is rendered by the Apex Court in the case of Thulia Kali v/s. State of Tamil Nadu reported AIR 1973 S.C. at page 501. The facts of this case also differ from the facts of the case on hand. In that case there was delay of about 20 hours, which was not duly explained. In this case, the same delay was not caused. Merely because considering the circumstances, which have been narrated above, if there is a delay of about 2 or 3 hours, such delay cannot be considered to be fatal to the prosecution, more so when the relatives of the deceased were in the process of securing medical help with the ray of hope that the medical treatment may save the life of the deceased. Moreover, in this case, as already stated above, the account of the incident given by the eye witness is supported or corroborated by the other circumstances on record. There is hardly any reason for us to discard the same on the ground that there is a delay in lodging the FIR and that it gave ample opportunity to the prosecution to cook up the false story against the appellants.

17. Submission of Mr. Thakkar is that in this case, there is a solitary eye witness and, therefore, unless there is ample corroboration from other sources and the evidence of said witnesses is found to be absolutely trustworthy, then alone it can be relied on and not otherwise and for that purpose also he has cited several decisions. However, in view of the fact that the evidence of Rayde receives ample corroboration from the medical evidence, we do not propose to discard his evidence and the decision cited by Mr. Thakkar on that count will not be of any help to the appellants.

18. Lastly the question that is now required to be decided is that even if we hold that the appellants are guilty, what offence has been committed by them. It can be seen from the medical evidence on record that not

a single injury out of 16 injuries which have been caused to the deceased, is described as fatal by the Medical Officer. Ofcource the fact that the appellants had assembled themselves duly armed with respective weapons in the field of Babu Lakha with a view to carrying out assault on the deceased and his brother clearly shows that they had gathered for some unlawful purpose. Therefore, their gathering can easily be termed as unlawful assembly as defined in the Indian Penal Code. The question that remains to be decided is what was the common object of this unlawful assembly; whether it was to commit murder or cause simple injuries. We may, therefore, revert back to the evidence of Dr. Kalele which has been adequately discussed above. However, for the purpose of deciding this question, if the injuries that have been stated in his evidence are perused, it shows that out of these injuries, one injury i.e. the blow inflicted by appellant no. 6 with iron pipe on the back side of the head of the deceased, is on the vital part and according to the Medical Officer, this injury could be termed as serious one, but it has not been termed out as fatal injury. The remaining injuries caused to the deceased by different appellants are not on vital parts, but they are either on the hands, legs or on the back of the deceased. Though three other injuries have resulted in causing fractures of the bone, the other injuries received by the deceased are simple in nature. In the opinion of the Medical Officer the cause of the death is shock and haemorrhage due to multiple injuries. He has not ascribed the cause of death to any particular injury. Had common object of the unlawful assembly been to do away with the deceased they would have, with these lethal weapons, carried out merciless assault on the deceased and would have caused him fatal injuries on his vital parts of the body, head being the easy target. However, this is not so. It, therefore, clearly appears that the appellants had only intended to belabour the deceased and for that very purpose they had gathered there. Unfortunately because of the cumulative effect of all the injuries deceased expired. But that would not bring their case u/S. 302 read with sec. 149 of the IPC having regard to the fact that if the injuries are viewed separately, none of the 16 injuries is said to be the cause of death of the deceased. In that view of the matter, we find that the finding given by the trial Court is erroneous and it is required to be set aside. Instead we hold the appellants guilty of committing offence made punishable u/S. 326 read with sec. 149 of the IPC.

19. Lastly the question with regard to quantum of sentence that may be awarded on the appellants

is required to be considered. It appears from the record that except appellant nos. 1 and 7, all the other appellants have remained in jail for more than three years. Appellant no. 6 has remained in jail right from the day he has been arrested in connection with this offence. The other appellants have been released on bail at pretrial and even after admission of this appeal by this Court. Appellants nos. 1 and 7 have been thereafter released on bail on 28th June, 1996 by this Court; whereas appellants nos. 2, 3, 4 and 5 have been released on bail on 19th November, 1997.

20. Considering the overall circumstances, which have appeared in this case, we feel that the ends of justice would meet if the appellants are sentenced to suffer RI for three years and each accused to pay fine of Rs.5,000/-, in default to suffer RI for three months. Hence, the appeal is partly allowed. The conviction and sentence of the imprisonment for life imposed on the appellants is set aside and instead they are convicted for committing offence u/S. 326 r/w. 149 of the IPC and sentenced to suffer RI for three years and to pay fine of Rs.5,000/= each over and above sentence of fine imposed by the trial Court, in default to suffer further RI for three months. Order regarding imposition of sentence for other offences will remain the same. As per the direction of the trial Court the sentences are to run concurrently. It is directed that out of the amount of fine that may be paid by the appellants, a sum of Rs. 25,000/- [Rupees twenty five thousand only] may be given to the heirs of the deceased Parbat after making proper verification by the trial Court.

The appellant no. 6, who is in custody is directed to be released upon payment of fine, if not required for any other purpose.

So far appellants nos. 2, 3, 4 and 5 are concerned, they have remained in custody for more than three years and, therefore, they are not required to be sent to prison. Their bail bonds will stand cancelled. This is subject to payment of fine by them.

So far appellants nos. 1 and 7 are concerned, they will have to surrender to the custody within a period of four weeks from today to serve out the remaining sentence and their bail bonds will stand cancelled.

[M. H. KADRI, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.